

CCASE:
SOL (MSHA) V. WALTER KUHL & SON
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 93-449-M
 :
WALTER KUHL and SON :

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988). On April 25, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Walter Kuhl and Son ("Kuhl") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's December 29, 1993, Order to Show Cause. The judge ordered the payment of civil penalties of \$364.

In a Motion to Reopen the Record dated May 19, 1994, and received by the Commission on May 26, 1994, the Secretary states that, in response to the December 29 order to show cause, he received an answer from Kuhl, which was addressed to "Mr. Paul Merlin." The Secretary erroneously assumed that the answer had also been forwarded to the Commission. Attached to the Secretary's motion is a letter from Kuhl dated January 20, 1994, asserting that no violations had been committed. The Secretary requests that the case be reopened and Kuhl's answer be placed in the record.

The judge's jurisdiction over this case terminated when his decision was issued on April 25, 1994. Commission Procedural Rule 69(b), 29 C.F.R.

2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. 823(d)(2); 29 C.F.R. 2700.70(a). The Commission received the Secretary's motion 31 days after the issuance of the judge's decision. The Commission did not act on the May 26 motion within the required statutory period for considering requests for review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1). In the interest of justice, we reopen this proceeding, deem the Secretary's motion to be a petition for discretionary review, excuse its late filing and grant the petition. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69

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(December 1986).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It appears from the record that Kuhl wished to pursue its contest of the alleged violations and that it attempted to respond to the judge's order to show cause. On the basis of the present record, however, we are unable to evaluate the merits of the Secretary's motion. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand for further proceedings.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner